

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company)	
)	ICC Docket No. 10-0467
Proposed General Increase in Electric Rates.)	

**REACT’S VERIFIED REPLY TO COMED’S RESPONSE TO
REACT’S COMBINED MOTION FOR RECONSIDERATION, MOTION FOR
STAY OF TIME TO FILE A PETITION FOR INTERLOCUTORY REVIEW AND
MOTION TO COMPEL RESPONSES TO REACT’S 6TH SET OF DATA REQUESTS**

The Coalition to Request Equitable Allocation of Costs Together (“REACT”), by and through its attorneys, DLA Piper LLP (US), pursuant to 83 Illinois Administrative Code Section 200.190, replies to the Verified Response (“Response”) of Commonwealth Edison Company (“ComEd”) to REACT’s Combined Motion for Reconsideration, Motion for Stay of Time to File a Petition for Interlocutory Review and Motion to Compel Responses to REACT’s 6th Set of Data Requests (“Combined Motion”). REACT respectfully requests that the Commission compel ComEd’s responses to REACT’s 2nd and 6th Set of Data Requests.¹ In support of this Motion REACT states the following:²

I.

INTRODUCTION

ComEd is withholding information that it has regarding the actual cost of providing service to its over-10 MW customer classes on the basis that it believes such information is completely irrelevant to its request to increase its rates to many of those customers by over a

¹ REACT notes that, given its Petition for Interlocutory Review filed and served on January 3, 2011, REACT’s request to stay the time for filing a Petition for Interlocutory Review is moot. REACT acknowledges that it has a Petition for Interlocutory Review before the Commission with regard to its appeal of the portion of the December 10 Ruling covering REACT Data Requests 2.11-2.17. REACT does not waive any arguments with regard to reconsideration of the December 10 Ruling.

million dollars per year, forever. ComEd's position is contrary to common sense -- much less the Public Utilities Act ("Act"), the Commission's regulations, and prior rulings by the Administrative Law Judges. The Commission should not permit ComEd to avoid producing information that is both obtainable (by its own repeated admissions) and necessary to determine whether its rates are "cost based," as required under the Act.

The Administrative Law Judges ruled on December 10, 2010, that REACT could request this information if it did so in a manner that focused on "assets used to serve the extra-large load class of ComEd customers." (December 10, 2010 Notice of Administrative Law Judges Ruling ("December 10 Ruling").) ComEd did not appeal that ruling, and the time to appeal has passed. Although REACT respectfully disagrees with the portion of the December 10 Ruling denying REACT's first Motion to Compel, it nonetheless immediately issued Data Requests conforming to the December 10 Ruling's instructions. Nevertheless, ComEd persists in its refusal to produce information.

ComEd focuses its Response on REACT Data Requests 6.06, 6.07, and 6.29. Although REACT disputes whether ComEd's "responses" to those data requests were, in fact, responsive, it is telling that ComEd's Response did not even address its non-responsive answers to the other Data Requests, particularly REACT Data Requests 6.31, 6.33, 6.35, and 6.40. Likewise, ComEd dismissed the related January 3, 2011 Ruling by the ALJs ("January 3 Ruling") inquiring into why ComEd had not produced relevant records, in a single sentence footnote ten pages into its Response. (*See* Response at 10 n.6.)

ComEd's basic premise is that examining ComEd's actual cost to provide service to the over-10 MW customer classes not only is irrelevant to this proceeding, but that examining that

² The positions stated herein do not necessarily represent the positions of any individual member

information in discovery could not lead to any relevant information. That premise is contrary to Illinois law. (*See Dufour v. Mobile Oil Corp.*, 301 Ill. App. 3d 156, 160, 703 N.E.2d 448, 451 (1st Dist. 1998).) The Commission should reject out of hand ComEd's absurd suggestion. Accordingly, REACT respectfully requests that the Commission compel ComEd to provide the information REACT is entitled to under Section 16-108(c) and (d) of the Act as requested in REACT's 2nd and 6th Set of Data Requests.

II.

THE COMMISSION SHOULD REJECT COMED'S ATTEMPT TO AVOID THE ACT'S REQUIREMENT TO DEMONSTRATE ITS RATES ARE COST-BASED

ComEd does not directly dispute, nor can it, that its rates must be "cost based" in a manner that accurately results in charges to "customers that use the facilities and services associated with such costs." (220 ILCS 5/16-108(c).) However, through the arguments it makes in support of its continued refusal to produce relevant, statutorily-required information, ComEd is attempting to skirt around the Act's requirements. ComEd appears to make three arguments why its ECOSSE alone is sufficient to prove that its rates to the largest customer classes are cost based. None has merit, particularly at the discovery phase of this proceeding.

First, ComEd asserts that REACT's Data Requests, propounded pursuant to the ALJs' December 10 Ruling and specifically identified as requesting class-wide information, are individual cost of service studies. (Response at 5-7.) ComEd's position leads to the impossible conclusion that no party may evaluate the cost basis for ComEd's proposed rates beyond requesting minor adjustment to ComEd's basic approach -- that is, by requesting adjustment of ComEd's allocators to Uniform System of Accounts ("USOA"). ComEd elliptically advances this argument when it states that "ComEd has provided the information that it has readily

of REACT.

available,” apparently referring to the USOA accounts. (Response at 12-13 (citing ComEd’s Response to REACT 6.29); *see also* Response at 5 n.4 (suggesting assets used to serve information has been available since the initial filing, referencing the ECOSS).) ComEd’s argument amounts to a diversion. To be clear, REACT has asked in multiple ways for the information necessary to determine which assets are used to provide service to the over-10 MW customer classes. It is now indisputable that ComEd will not provide the information unless and until it is compelled to do so by an Administrative Law Judge Ruling.

Second, ComEd asserts that because it has always allocated based on rate classes, it cannot look at class-wide information. (*See* Response at 8.) ComEd is apparently suggesting that REACT seeks some sort of shift away from rate setting by customer class. However, as REACT has clearly stated on a number of occasions, it does not seek to change having a uniform delivery rate for the largest classes. Instead, REACT merely requests that the rate that ComEd does charge be cost-based, as required by the Act, and that ComEd provide verifiable information by which the Commission can confirm the veracity of such rates.

Third, ComEd asserts that because it complied with the requirements in Part 285 of the Commission’s Rules for filing its ECOSS, the inquiry should end. (*See* Response at 7-8.) Obviously, parties must be allowed to conduct discovery beyond the documents that ComEd has filed. Moreover, Part 285 does not and cannot trump the requirements of the Act. Part 285 offers guidance on the format for presenting a rate case. However, ComEd does not and cannot identify any section of Part 285 that states that merely filing an ECOSS creates an irrefutable presumption that rates are, in fact, cost based. Indeed, ComEd implicitly acknowledges this point when it quotes from Section 285.5110, which states: “Each electric and gas utility . . . shall submit, **at a minimum**, an embedded cost of service study for each rate increase application

based on costs for the proposed test year.” (83 Ill. Admin. Code § 285.5110 (emphasis added).) Thus, the Rule upon which ComEd relies explicitly contemplates that the submission of merely an ECOSS may be insufficient to justify a proposed rate increase.

Further, ComEd ignores the fact that the Commission repeatedly and consistently has refused to embrace ComEd’s ECOSS to set rates for the classes of comprised of ComEd’s largest customers. In the 2001 ComEd Rate Case, rather than applying ComEd’s ECOSS to set the rates for these classes, they were set pursuant to a settlement. (*See* 01-0423 Final Order dated March 28, 2003, at 138-39.) In the 2005 ComEd Rate Case, the Commission again concluded that it was inappropriate to apply ComEd’s ECOSS to the over-10 MW classes, and instead applied a system-average increase to those customers. (*See* ICC Docket No. 05-0597, July 26, 2006 Order at 196; ICC Docket No 05-0597, December 20, 2006 Final Order on Rehearing, at 65-66.) Most recently, in both the 2007 Rate Case and the Special Investigation Proceeding, the Commission was highly critical of ComEd’s ECOSS approach and did not accept it to set the rates for these customer classes. (ICC Docket No. 07-0566, Final Order dated September 10, 2008, at 206-207, 213; ICC Docket No. 08-0532, Final Order dated April 21, 2010, at 38-39, 67.)

REACT respectfully requests that the Commission end this struggle by compelling ComEd to produce the information that will put to rest the issue of whether the proposed rates to the over-10 MW customer classes are, in fact, cost based.

III.

THE COMMISSION SHOULD COMPEL FULL RESPONSES TO REACT’S 6TH SET OF DATA REQUESTS AND TO THE JANUARY 3 RULING

ComEd’s arguments that it fully responded to REACT 6.06, 6.07, and 6.29 are incorrect. Furthermore, ComEd does not even attempt to defend its responses to REACT 6.31, 6.33, and

6.40, all of which fall squarely under an unappealed portion of the ALJs' December 10 Ruling. Finally, ComEd has not fully complied with the ALJs' January 3, 2011 Ruling.

First, with regard to REACT 6.06 and 6.07, REACT requested that ComEd identify what standard collection of assets ComEd uses to provide "standard service" to the Extra Large Load customer class. In its response, ComEd claimed not to understand the concept of "standard service" (as identified by Mr. Terhune) as part of its response, rendering any further response by ComEd a nullity. In other words, ComEd cannot both not understand the concept of "standard service" (as it claimed in its response to the data request) and simultaneously answer these data requests fully (as it claimed in its response to the Motion). Second, with regard to ComEd's response to REACT 6.28, even to the extent that REACT did not request documents (which *was* covered under REACT 6.29), ComEd did not respond to the question of "identify **with specificity**" the assets used to serve a particular customer. (REACT 6.28 (emphasis added).)

Second, with regard to REACT 6.29, REACT's direct request for a description of the assets used to serve the Extra Large Load customer class, despite ComEd's prior admissions cited in the Combined Motion that such a study is possible -- and a brand new admission in the surrebuttal testimony of Mr. Alongi along the same lines -- ComEd continues to refuse to provide this information. (*See* Combined Motion at 5-8; ComEd Ex. 73.0 at 21:472-23:510.) ComEd clearly understands the basic steps it must take to undertake such a study, as exemplified by Mr. Alongi's surrebuttal, but refuses to do so despite the fact it did not appeal the December 10 Ruling, which permitted REACT to request such information on a class-wide basis. (*See* Ex. 73.0 at 21:472-23:510.)

Similarly, ComEd does not attempt to justify its refusal to respond to REACT 6.31, 6.33, 6.35, or 6.40 -- a failure that highlights ComEd's deficient answer to the ALJs' January 3, 2011

Ruling. As the ALJs pointed out in the January 3 Ruling, ComEd admittedly evaluates the assets used to serve a customer when changing or initiating service, which would include supplying service under Rider NS or supplying non-Standard Service for ComEd's convenience. (*See* January 3 Ruling.) However, ComEd has not reconciled its answer to REACT 6.28 with its responses in REACT 6.31, 6.33, 6.35, and 6.40 as to why it cannot come up with a list of assets that are taken out of rate base pursuant to Rider NS or which assets it claims would serve the over-10 MW customer classes for which it would not otherwise recover if assets inadequate to provide Standard Service were excluded. Instead, even reading its Response charitably, ComEd has not sought to excuse its non-responsive answers regarding Rider NS facilities used to provide service to the over-10 MW customer classes. As a result, ComEd has failed to address the fundamental question underlying the ALJs' January 3 Ruling.

Ironically, ComEd attempts to use REACT witness Mr. Terhune's attempt at accommodation of ComEd's position in his Rebuttal Testimony as a sign that REACT no longer seeks asset-used-to-serve information. (*See* Response at 13.) ComEd's argument is not well taken, and seems to rest on the odd notion that if rebuttal testimony does not simply repeat direct testimony, then the witness has somehow abandoned the position taken in direct testimony. A fair reading of Mr. Terhune's Rebuttal Testimony rebuts ComEd's interpretation. Mr. Terhune freely acknowledges in his Rebuttal Testimony that the survey he recommends does not require direct observation of every single conductor. Rather, Mr. Terhune suggests something similar to -- though not identical to -- ComEd's Primary/Secondary Study, a point that Mr. Alongi appears to acknowledge in his surrebuttal *except* for the imagined requirement that ComEd must directly observe every one of its claimed almost 6,400 circuits. (ComEd Ex. 73.0 at 22:490-23:510.)

It should be noted that Mr. Terhune is making a constructive suggestion in the spirit of trying to offer some avenue to agreement on how ComEd could provide appropriate cost-of-service information. Rather than substantively embrace that constructive approach, ComEd cherry-picks language from Mr. Terhune's testimony to suggest that REACT has somehow completely abandoned its basic tenant. Notwithstanding ComEd's approach, REACT reiterates its offer to make Mr. Terhune available to ComEd individually or as part of a workshop process to clear up any lingering confusion on ComEd's part. (See Verified Petition for Interlocutory Review of REACT, filed January 3, 2011, at 6 n.3.)

ComEd has the ability to provide additional information regarding the assets actually used to provide service to the over-10 MW customer classes, but has refused to provide it. REACT respectfully requests that ComEd be compelled to provide that information.

IV.

CONCLUSION

Examining the actual costs that ComEd incurred to provide service to its over-10 MW customer classes is a relevant inquiry, particularly when ComEd is requesting to increase costs to individual customers in these classes by more than a million dollars per year, forever. It is not sufficient for ComEd to present an ECOSS that comports with the minimum requirements of Part 285; that is the beginning of the inquiry, not the end. The Commission's policy regarding discovery provides for "**full disclosure of all** relevant and material facts to a proceeding." (83 Ill. Admin. Code § 200.340) (emphasis added). REACT encourages the Commission to compel ComEd to provide the necessary and obtainable information described above to allow for a full discussion of cost causation.

WHEREFORE, the Coalition to Request Equitable Allocation of Costs Together respectfully requests rejection of ComEd's objections and compulsion of ComEd's full responses to REACT's 2nd and 6th Set of Data Requests and such other relief deemed appropriate by the Commission.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

By: /s/ Christopher J. Townsend
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VERIFICATION

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Coalition to Request Equitable Allocation of Costs Together, that he has read the above and foregoing document, knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

Subscribed and sworn to me
this 7th day of January, 2011.

Christopher J. Townsend
